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AUTHOR Pizante, Gary
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ABSTRACT

The new and immense task that awaits the judiciary of Canada is to decide what limitations, if any, ought to be imposed upon freedom of expression as protected in the new Canadian Constitution with an entrenched Charter of Rights. The area of civil libel law provides special problems related to free speech and press. One source of help for scholars, lawyers, and judges struggling with this problem is the thinking of the American philosopher, Alexander Meiklejohn. His view is that the First Amendment was meant to protect political speech. Thus, he heralded the United States Supreme Court decision in "New York Times vs. Sullivan" as "an occasion for dancing in the streets." It is questionable, however, whether the Canadian courts will accept this theory of self-government and its idea of what is reasonable. Ultimately, the decision rests on how much of a departure from the past the Charter represents. The original purpose of the Canadian system was to provide peace, order, and good government and not life, liberty, and the pursuit of happiness. Meiklejohn's thinking is based on a respect for the sovereignty of the people and on their ability to handle democratic tasks. Parts of his theory may lie on the surface of Canadian ideas, which, as the Charter shows, have a commitment to freedom of expression. The coming court battles and judicial decisions will demonstrate just how deeply that commitment goes. (The Canadian Charter of Rights and Freedoms is appended.) (HOD)

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THE CANADIAN CHARTER OF RIGHTS, AMERICAN JURISPRUDENCE, AND CANADIAN CIVIL LIBEL LAW: WILL THERE BE AN OCCASION FOR DANCING IN CANADIAN STREETS?

By

Gary Pizante

Gary Pizante is a doctoral student in the Mass Media program at Michigan State University. Paper to be presented to the Law Division of the AEJMC Convention in Memphis, Tennessee, August 3-6, 1985.

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INTRODUCTION

> It is difficult...to see how an effective Bill of Rights could ever be entrenched in Canada. (1)
>
> Edgar Friedenberg in
> Deference to Authority:
> The Case of Canada. (1980)

Two years after Friedenberg[2] published this thoughtful work, a new Canadian Constitution with an entrenched Charter of Rights received the blessings of Parliament, nine provincial legislatures[3], and the Parliament of the United Kingdom, and became "the supreme law of Canada..."[4]; yet, as Friedenberg's statement implies, there remain questions on how "effective" this new Canadian Charter will be in protecting and extending the right of freedom of expression in Canada. (Section 2(b) of the Charter; see the appendix for all the relevant provisions of the Charter.)

To guage this effectiveness, and to guide ourselves toward it, it is essential, as Emerson makes clear, to fit a theory of freedom of expression

> into a more comprehensive scheme of social values and goals. The crucial issues have revolved around the question of what limitations, if any, ought to be imposed upon freedom of expression in order to reconcile that interest with other individual and social interests sought by the good society. (5)

This is the new and awesome task that awaits the judiciary of Canada. Canadian Supreme Court Chief Justice Dickson recognized this challenge in a recent speech to the Ontario Bar Association.

> The Words and Expressions used in the Charter are broad and in many instances purposely vague. What is meant by "freedom of expression"?.... The determination of the meaning of [this term] requires a philosophic, and possibly a political, theory as a context. It is only if you know <u>why</u> freedom of expression...is suitable for protection in a <u>Charter of Rights and Freedoms</u> that you can know whether a given situation falls within or outside of [this term]. (6; His emphasis)

One source of help for scholars, lawyers and judges struggling to construct

a Canadian theory of expression has been, naturally enough, American jurisprudence and philosophy. Although many who have written and spoken on this subject refer to America's travails with its First Amendment guarantees of free speech and a free press, they do so rather differently--stretching from the view that American jurisprudence can be "a guide" for Canada[7], to a blunt warning about the impending "Americanization of the British Justice system."[8]

However useful the American experience is seen, the fact that it is even mentioned emphasizes the new lines of inquiry forced on the judicial system.[9] Even those who argue that freedom of expression probably will not be extended by the courts in the forseeable future, claim that the Charter will nonetheless "have an immediate and wide-ranging impact on the way in which [lawyers] argue cases, and on the way in which [judges] reason about these cases."[10]

One area of law which will undoubtedly see new reasoning, and will therefore require a new--or at least a renovated--theory of freedom, is in the tricky area of civil libel.[11] It is called tricky since it has traditionally provided messy intellectual problems for free speech and press advocates. Schauer observes that defamation in Britain "has been in the past so much of a problem for free speech theory that it was not treated as a problem at all."[12] In the U.S., Emerson, who sees it as less of a complex problem to solve than Schauer, still writes that "active supporters of freedom of expression have had some difficulty in fitting the law of civil libel and slander into a tightly constructed scheme of first amendment interpretation."[13]

The problem stems from the direct conflict between the right to freely express one's opinions without fear of harm and the value society puts on the right of an individual, or a group, to obtain retribution for the harm caused--which can be immense[14]--by a defamed reputation, falsely or otherwise.

As one cannot stand still and move at the same time, one cannot fully satisfy both of these rights; "Whatever is added to the field of libel is taken from the field of free debate."[15]

It will be argued in this paper that the most effective and appropriate way of interpreting Section 2(b) in respect to the libel laws is through a rough adoption of the thinking of the well known American philosopher, Alexander Meiklejohn. In its rawest and simplest form, his view holds that the First Amendment was meant to, and should, protect political speech; that is, speech that has a "social importance" because of its connection to the political process.[16] Thus, all expression on public officials on their conduct in their public capacities should be given a much higher degree of protection from libel actions brought by public officials than allowed by the common law. More specifically, it is proposed here that the broad protections recognized by the U.S. Supreme Court in New York Times vs. Sullivan[17] be adopted; a decision that Meiklejohn heralded as "an occasion for dancing in the streets."[18]

On this opinion, there is little agreement to be found from Canadian thinkers and practicioners of law. Their conclusions on the inter-play between libels of public officials and the Charter can be broken down, without too much of a loss in nuance and detail, into two distinct groups: 1) The status quo should, in the main, be kept[19]; and 2) A qualified privilege of expression should be extended to the media[20]. As far as this student knows, no one has yet written in support of a full application of the New York Times rule to Canada.

Each of these positions will be fleshed out and held up to the light of the Charter and the early decisions that have already emerged from Charter cases. Also, the implications of these opinions for a theory of freedom of

expression, and their antecedent views on the nature and role in a democracy of the citizenry, the press, and the government, will be examined and critiqued.

THE STATUS QUO

The dissenting opinion of Justice Dickson in Chernesky vs. Armadale Publishers Ltd., a pre-Charter case, eloquently states the rationale for the defences available in current Canadian libel law.

> The law of defamation must strike a fair balance between the protection of reputation and the protection of free speech, for it asserts that a statement is not actionable, in spite of the fact that it is defamatory, if it constitutes the truth, or is privileged, or is fair comment on a matter of public interest, expressed without malice by the publisher....It is these defences which give substance to the principle of free speech. (21)

One could point out that there is a new weight affecting this "balance"--Section 2(b) of the Charter--and that what was once a "principle" is now an entrenched freedom.[22] However, before a thorough discussion of those supporting the status quo can begin, what they are defending, and is being attacked, must be made clear. Thus, the "maze" of Canadian libel law is entered below.[23]

a. Contemporary Canadian Libel Law

In Canada, libel, as a civil matter, is under the jurisdiction of the provinces.[24] Eight provinces have passed acts dealing with it which set out some of the defences available and some procedural rules.[25] However, "most of the law of defamation...is non-statutory," and is based on common law.[26]

As Weiler notes, Canada's libel laws are based on the principle of strict liability.[27] Once the plaintiff has established a prima facie case:

i) damages are presumed

ii) intention is presumed

iii) falsity of the defamatory statement is presumed. (28)

To make this case, the plaintiff must show:

i) the statement or matter in question was defamatory

ii) it referred to the plaintiff and

iii) it was published. (29)

What, then, is considered to be defamatory? As common law is a collection of decisions by courts throughout the Commonwealth and the U.S., it is not surprising that there exists no "universally accepted definition of defamatory."[30] One commonly used definition was formed by Lork Atkin in Sim vs. Stretch.

> Would the words tend to lower the plaintiff in the estimation of right-thinking members of society generally? (31)

Once the prima facie case is accepted, the defendant has, typically speaking, three defences at his disposal: justification, privilege, and fair comment. Justification, the defence of truth, has been called both "a good defence" and one that is "potentially dangerous".[32] It is good in the sense that it will, if passed, succeed in every case regardless of how defamatory the statement or if it was published with malice; but, it is dangerous, since if it fails, it could aggravate the harm done.[33] The onus of proof is on the defendant, although it is not necessary for him to prove all the particulars of the imputation, if they do not "add to the sting" of the libel.[34] The rationale of this defence is that no one should be punished for publishing a truth--but one must be prepared to prove it.

The defence of privilege is divided into two categories: absolute and qualified. An occasion of absolute privilege will succeed in every libel action. Very few moments, though, are accorded an absolute privilege.[35] These protected activities are considered too important to the public to leave any room for private redress in a libel action.[36]

Qualified privilege relieves the defendant of the burden of proving

the defamation, if it is judged to be protected "for the common convenience and welfare of society."[37] For this reason, Porter calls it "a lovely defence."[38] The plaintiff can, however, knock the defence down if he can show malice on the part of the defendant. Malice has recently been re-defined as the acts of either publishing a known falsehood, or publishing with a "desire to injure the person who is defamed...which must be the dominant motive for the defamatory publication."[39]

There are problems deciding whether a defence of qualified privilege is appropriate for a particular case. The test for this is deliberately vague: Is there a duty, legal or moral, for the communicator to make his message heard, and is there a duty and corresponding interest to receive the message among a substantial portion of those who receive it?[40] The House of Lords explained that:

> The circumstances that constitute a privileged occasion can themselves never be catalogued and rendered exact. New arrangements of business, even new habits of life, may create unexpected combinations of circumstances which, though they differ from well known instances of privileged occasion, may nonetheless fall into that category. (41)

Doody argues that the new circumstance in Canadian law--the Charter--should lead the courts to extend a qualifed privilege to the news media in all expression concerning public officials.[42] Presently in Canada, the press, and almost everyone else, is not generally protected by this defence.[43] In Littleton vs. Hamilton it was said that:

> In order to hold that words are published on an occasion of qualified privilege, something more is necessary than the mere fact that the words are being addressed to a matter of public interest. (44)

In other words, the public has no duty and corresponding interest in receiving as much information as can be gathered about the public activities of their public officials.

Briefly, fair comment is often used in the form of the "rolled up plea".

> In so far as the said words consist of statements of fact the said words are true in substance and in fact; in so far as the said words consist of expression of opinion, they are fair comment made upon the said facts which are a matter of public interest. (45)

Thus, the message must:

1) be on a matter of public interest,
2) be an honestly held opinon;
3) be based on proven facts;
4) have comments which can be recognized as such by the ordinary person.(46)

Malice, as it was defined above, defeats fair comment.

b. Application of the Charter

There are numerous points to the argument that the Charter should not have much impact on libel. The first, and most devastating to freedom of expression if accepted, is that the Charter does not apply to disputes between private individuals or entities, but only between individuals and governments. This is based on Section 32(1), the application clause that makes specific references to the provincial and federal governments (see Appendix). Depressingly, there is some evidence suggesting that this was the intention of the framers of the constitution.

Speaking before the Special Joint Committee on the Constitution set up by Parliament, F. Jordan, Senior Counsel in the federal Department of Justice, said that the Carter "addresses itself only to laws and relationships between the state and individuals, it does not attempt to deal with private relationships."[47]

The former Attorney-General of Ontario, Roy McMurtry, who was an active participant in the political process that somehow led to a near consensus on the constitution among the generally quarrelsome provinces, said in a recent speech to the Canadian Bar Association:

> Some observers are of the view that the Charter forms the foundation for a new variety of claims in tort based upon the violation of rights guaranteed by the Charter....I can assure you consideration was given to that issue and care was taken to make clear the intent that the Charter is to apply to the activities of legislatures and governments only. (48)

The Supreme Court of Canada has yet to make a decision on this question. So, in the happy spirit of speculation, there are some very strong arguments available supporting the view that the Charter should be read to encompass private actions.

Firstly, there is Section 24(1). Madott points out that "this provision would appear to contemplate proceedings not only against governments, but by one individual against another."[49] Also, Section 52(1) states that the Charter is "the supreme law of Canada..."[50] Following this, Gibson argues that since all Canadians, public and private, are subject to the law, "the notion that constitutional laws are inherently inapplicable to private conduct is no longer supportable, if it ever was."[51] Furthermore, as Doody observes, Section 32(1) refers to "all matters within the authority of the legislature of each province," which must include torts since they are in what used to be the sovereign domain of the provincial legislatures.[52] Finally, the wording of Section 32(1) does not exclude the possibility that the Charter also applies to private affairs; it does not say, for example, "This Charter applies only..."

Doody argues that the main reason for the explicit references to the Crown in Section 32 was to make it "very clear that in certain cases the supremacy of Parliament no longer existed."[53] In the pre-Charter days, Parliament was held sovereign, gaining its authority from the consent of the governed and history--it was free to do anything it pleased within its jurisdiction. Gibson adds that since ordinary legislation does not apply to the Crown unless it is specified, the framers of the constitution were likely concerned that the same might hold true for the constitution.[54]

Although it is still quite early, the courts might warm to these arguments.

In the case of R. vs. Lerke, the defendant claimed that his Charter right of freedom from unreasonable search and seizure was violated by a tavern employee. Without seeking consent, the employee had searched the defendant's coat pockets and found a small bag of contraband. The Crown argued that the Charter does not apply to violations of rights by private citizens. The Alberta Court balked at this, and held that the Charter was indeed "applicable to private citizens."[55]

On this basis, then, the Canadian Supreme Court might follow the precedent set by the U.S. Supreme Court in the New York Times case when it was faced with a similar applications problem. The Alabama Supreme Court, in its ruling against the Times, contended that the First Amendment was not relevant to the lawsuit since the "Fourteenth Amendment is directed against State action and not private action."[56] The U.S. court destroyed this argument.

> That proposition has no application to this case. Although this is a civil lawsuit between private parties, the Alabama courts have applied a state rule of law which petitioners claim to impose invalid restrictions on their constitutional freedoms of speech and press.
>
> What a state may not constitutionally bring about by means of a criminal statute is likewise beyond reach of its civil law of libel. (57)

c. The Limitations Clause and Political Freedom

If Section 2(b) can manage to get over the application barrier, it still faces one more obstacle: Section 1, or as it is generally known, the limitations clause.[58] There are four elements to this clause: 1) reasonable limits; 2) prescribed by law; 3) as can be demonstrably justified; 4) in a free and democratic society. Parts (1), (3), and (4) pose the greatest problems; in a sense, they are totally "dependent on the attitude of the judiciary," since that will determine what is, and is not, capable of being a "reasonable limit" and "demonstrably justified in a free and democratic society."[59] It will involve the courts, as Porter points out, in setting the political framework

for Canada.[60] And as Dickson noted (see page 1), the courts will need a political theory to inform them on proper decisions along these lines. For this reason, the status quo arguments on Section 1 are combined here with an examination of their philosophy for democracy in Canada.

Before beginning this, it should be known that the phrase "as can be demonstrably justified" apparently has the effect of placing the burden of proof on the party claiming that there is a need to limit any of the fundamental freedoms. In a decision over the constitutionality of a statute barring the press and public from all juvenile trials, the Ontario Court of Appeals said that the wording of this section:

> imposes a positive obligation on those seeking to uphold the limit or limits to establish to the satisfaction of the court by evidence, by the terms and purpose of the limiting law, its economic, social and political background, and, if felt helpful, by references to comparable legislation of other acknowledged free and democratic societies, that such limits are reasonable and demonstrably justified in a free and democratic society. (61)

However, before one gets tempted to reach into the closet for the dancing shoes, one should read further.

> In some cases...the frivolous nature of the claim to protection of a freedom...will be immediately apparent and it will not take great effort to determine that the claim to a guaranteed freedom or right is not tenable under the Charter and under the circumstances. But this is not that case. (62)

Will it be a civil libel case? A great deal hinges on the philosophical grounding of the limit.

Status quo advocates argue that many other Western nations have civil libel laws--pre-Charter Canada had them, and it was certainly a free and democratic society. Libel is a real injury, they say, and society has an interest in providing a method for redressing wrongly defamed reputations. Besides, there are defences available to defendants which already adequately

protect their freedom of expression.[63] Considering the harm, then, the limitation is reasonable and justified.

Their reasoning becomes more strained on the subject of libels and public officials. It boils down to this: If the reputations of public officials are not afforded adequate protection, then "good" people will not seek public office.[64] In 1978, Chief Justice Deschenes of the Quebec Superior Court elaborated this argument in Snyder vs. Montreal Gazette.

> If society wants, as it should, that its best citizens turn to public affairs, it must show the high esteem in which it holds them; and those who would imprudently risk, by a stroke of the pen, to destroy the reputation of such dedicated men, ought to be prepared to pay the high price that such a misdeed deserves. The freedom of the press can only be preserved as long as the press itself shows its sense of responsibility. (65)

The "price" is getting higher. Prior to 1978, libel awards to public officials were fairly low--especially by American standards. The highest award previous to the $135,000 assessed in Snyder was $35,000.[66] Butler and Porter contend that "even the most ardent 'freedom of the press' advocate would have to concede that pre-Snyder awards were simply a license to defame."[67] However, since then, there have been libel awards already affirmed in various provinces in the sums of $20,000[68], $75,000[69], and $100,000.[70] And, finally, the sum of $1,000,000 was reached in a jury award on October 19, 1984.[71]

Is the spectre of these high awards a "reasonable limit" of the freedom to say what one thinks about a public official's capacity to perform public business? Under the rationale offered by Deschenes, one could say yes. But this view seems to have a backwards idea of governing in a democracy. Meiklejohn holds that it is the people who govern, and not those temporarily in the offices of government. "Political freedom is...self-government."[72]

The notion that citizens must gauge their remarks so as not to endanger their chances of finding "good" people to govern them is anathema

to the ideal of self-government. It has a paternalistic and aristocratic ring to it that suggests that the voters are not fit to comment on public affairs even close to the same degree as Parliamentarians--who enjoy an absolute privilege in that chamber--and that, besides, they have no need to, since the business of government is already being conducted for them by the few. It is true that Canadians choose those few, and the system demands that its citizenry votes, but it does not allow the people to engage in the robust style of debate necessary to insure fair decisions, since everyone would be rightly afraid of the punishment for making a defamatory statement.[73] In Canada, then, an unpublished truth, which could be of crucial importance to the decisions at hand, would be tolerated so that public officials could protect their private reputations through the courts. Indeed, in this conception of democracy, the restraint of expression is seen as resulting in better government. This proposition seems absurd. The "best" people to lead would not, in my opinion, be those who are thin-skinned and require a large legal shield from the inevitable barbs and criticisms of the electorate, but would instead be those able to understand the motivations of the attacks and gamely work to either put them at ease or fight against them through their own expressions.

A QUALIFIED PRIVILEGE FOR THE PRESS

The academics and lawyers in support of this position argue that the "fundamental 'freedom of the press and other media of communication' in Section 2(b) [creates] a new category of qualified privilege for media defendants when they publish information about people in public life."[74] Much of their reasoning is based, in a rough form, on the dicta in the New York Times case and on the idea that the press has been recognized as a "special" institution in Canada for over fifty years.

The last point is crucial to their argument. The defence of qualified privilege has never been generously granted by the courts (see page 6). Traditionally, the press has not been judged as deserving of this protection any more than ordinary citizens. This doctrine originates from the 1914 House of Lords decision in Arnold vs. The King-Emperor and has been re-affirmed in a majority opinion of the Canadian Supreme Court which quoted it directly.

> Their Lordships regret to find there appeared on the one side of this case the time-worn fallacy that some kind of privilege attaches to the profession of the Press as distinguished from the members of the public. The freedom of the journalist is an ordinary part of the freedom of the subject, and to whatever lengths the subject in general may go, so also may the journalist, but, apart from statute law, his privilege is no other and no higher. (75)

At the moment, this is, as Porter laments, "the hard rock law."[76] But qualified privilege has always been seen as flexible in its application, and adaptable to new circumstances. If the press had been recognized as important to the smooth functioning of the Canadian constitution before the Charter, its new entrenched freedom might just be enough to nudge it under the umbrella of privilege.

In 1938, in Re Alberta Statutes, Chief Justice Duff said for the court that the constitution

> contemplates a Parliament working under the influence of public opinion and public discussion. There can be no controversy that such institutions derive their efficacy from the free public discussion of affairs, from criticism and answer and counter-criticism....This is signally true in respect of the discharge by Ministers of the Crown of their responsibility to Parliament, by members of Parliament of their duty to the electors, and by the electors themselves of their responsibilities in the election of their representatives. (77)

Justice Cannon concurred, but gave special recognition to the position of the press.

> There must be untrammelled publication of the news and political opinions of the political parties contending for ascendancy....Democracy cannot be maintained without its foundation: free public opinion and free discussion throughout the nation of all matters affecting the state within the limits set by the Criminal Code and the common law. (78)

Parliament had sovereignty over the Criminal Code. So, the Court struck down the heavy restrictions created by the Alberta statutes not because they violated constitutional guarantees or principles, but because the legislation was ultra vires (outside of the jurisdictional boundaries).[79] Still, strong statements had been made about the imperative of free speech and a free press for Canadian democracy.[80]

The reasoning for the U.S. Supreme Court in New York Times vs. Sullivan provides the philosophical justification for broadening the protection from libel, although not exclusively for those in the press. Press privilege supporters quote liberally from Justice Brennan's opinion, but they seem closer to the thought of Justice Stewart and his claim, stated long after the New York Times case, that the press have unique rights.[81] However, this ruling was a true breakthrough, as it recognized the right of all citizens, including the press, to make errors in their remarks on public officials. The U.S. Court expressed its purpose by claiming that:

> The general propsoition that freedom of expression upon public questions is secured by the First Amendment has long been settled by our decisions. The constitutional safeguard, we have said, was fashioned to assure unfettered interchange of ideas for the bringing about of political and social change desired by the people....It is a prized American privilege to speak one's mind, although not always with good taste, on all public institutions. (82)

The court went on to say that an "erroneous statement...is inevitable in a free debate, and...must be protected if the freedoms of expression are to have the breathing space that they...need to survive."[83] To insure an "uninhibited, robust, and wide open" debate on public matters, the Court granted a constitutional privilege for defamatory statements on public officials.[84] This privilege was not absolute. Instead, public officials would have to show that the statement by the defendant, which must be proven as false, was "made with 'actual malice'--that is, with knowledge that it was false or with reckless disregard of whether it was false or not."[85]

Following New York Times, the Court kept extending the type of people forced to prove malice in libel, until they finally reached the point, in a plurality decision in Rosenbloom vs. Metromedia Inc., where anyone involved in a public issue--a public official, a public figure, or a private individual--would have to meet the New York Times test for malice.[86] In 1974, the Court recanted in Gertz vs. Robert Welch Inc. and held the malice standard applicable only to public officials and public figures, or to private plaintiffs who attempted to gain more than actual damages from media defendants.[87]

The arguments for an extension of qualified privilege for the press are persuasive. Advocates can show that it imposes reasonable limits since only those essential to democracy could use the defence. They can demonstrate the press's traditionally recognized role in Canadian history through the dicta of the Canadian Supreme Court. And, finally, they can argue that the phrase in Section 2(b) referring to the press is not--to use the words of Justice Stewart--a "constitutional redundancy," but is a constitutional observation of their special functions and rights.[88]

The critique starts with the last point. The First Amendment "Press Clause" arguably makes a distinction between "free speech" and "free press" by connecting them with "or." One, then, seems to be different from the other.[89] In Canada, the connector is "including" which seems to suggest that "freedom of the press and other media of communication," is just one aspect of "freedom of expression." If the press really was meant to be "special" why was it not made more obvious by, say, giving it a special subsection of its own? It was probably explicitly identified not to indicate a preferred position, but to exemplify that it was a part of freedom of expression, and to leave no doubt of it.

There is a deeper criticism to make on the implications of this position.

Like the position for the status quo, this proposal declares the people to be undeserving or unqualified to have freedom to comment uninhibitedly on government conduct. The press may call itself the surrogate of the public, or the watchdog, but granting a qualified privilege exclusively to it places the citizenry more in the role of spectator than participant. Individuals and groups not part of the press--however that would be defined--would have to watch their words, written or spoken, as they try to debate in the political process. This would not encourage political activity, unless activity is defined as political voyeurism: the watching and privately judging of the business of government.

Certainly, the press has the most to gain, in an economic sense, from increased protections from libel suits. It seems preferable, though, to get those protections without the press separating itself from the people, as exclusivity does violence to the ideal of self-government. The people should have the freedom to participate fully through their own expressions, and not be forced to rely only on the expressions of the media.

CONCLUSIONS: MEIKLEJOHN AND LIBEL FOR CANADA

On libel, Meiklejohn has written that in actions of

> private defamation, one individual does damage to another by tongue or pen; the person so injured in reputation or property may sue for damages. But, in that case, the First Amendment gives no protection to the person sued. His verbal attack has no relation to the business of governing. If, however, the same verbal attack is made in order to show the unfitness of a candidate for governmental office, the act is properly regarded as a citizen's participation in government. It is therefore protected by the First Amendment. And the same principle holds good if a citizen attacks, by words of disapproval and condemnation, the policies of the government....These are "public" issues concerning which, under our form of government, he has authority, and is assumed to have competence to judge. (90)

This is based on the view that the First Amendment was meant to protect speech "when utilized for the governing of the nation."[91] At first glance, this

might seem like a narrow interpretation of free speech, but Meiklejohn claims that "there are many forms of thought and expression within the range of human communications from which the voter derives the knowledge, intelligence, sensitivity to human values...which as far as possible, a ballot should express."[92]

Fundamentally, then, the First Amendment is there to make sure the people can govern their "subordinate agents" wisely.[93] Under Meiklejohn, the citizens' responibilities are heavy; they are expected to muster all the energy and wit at their disposal to vote and debate. But first they must have the freedom to do so.

Will the Canadian courts accept this theory of self-government and its idea of what is reasonable? The weight of history is heavy, and it does not tip the scales in favor of the Meiklejohn view. Ultimately, the decision rests on how much of a departure from the past the Charter represents.

The original purposes of the Canadian system as set out in 1867 was to provide "peace, order, and good government" and not "life, liberty, and the pursuit of happiness."[94] Further, the Charter did not arise from a revolution, but through a seemingly endless series of conferences of well-dressed leaders of governments and their bureaucratic minions. This is all said to demonstrate the problem of applying Meiklejohn to Canada. He spoke directly to the uniqueness of the American experiment.

Although it would be surprising if the Meiklejohn approach was quickly adopted by the courts, it does not seem far-fetched to think that, over the years, a similar view could evolve. Certainly it took a great deal of time for the U.S. Supreme Court to begin seriously considering the practical and philosophical meaning of the First Amendment. Barron has said that, in the main, the history of First Amendment interpretations goes back only fifty-six years, when, in 1919, the Supreme Court dealt directly with the breadth of

free speech protections in the Schenck case.[95] It took another forty-five years after that for the Court to accept the philosophy embedded in the New York Times ruling.

Before Schenck, the interpretations of the First Amendment were generally rather narrow. In 1897, the Supreme Court held that:

> The law is perfectly well settled that the first ten amendments to the constitution, commonly known as the Bill of Rights, were not intended to lay down any novel principles of government, but simply to embody certain guarantees and immunities which we had inherited from our English ancestors. (96)

Meiklejohn attacked this idea as "the most disastorous judicial judgement that [he had ever] found..."[97] However, the last fifty-five years of American jurisprudence would seem to have, as he says, "cut that idea into meaningless little bits..."[98] It might take some time for the Canadian Supreme Court to recognize the "novel principles of government" in the new constitution.

The Charter confronts the nation, and particularly the judiciary, with the question of the meaning of Canadian democracy. It is a great self-definition exercise. Meiklejohn's thinking is based on a respect for the sovereignty of the people, and on their ability to handle democratic tasks. Parts of his theory may lie on the surface of Canadian ideals, which, as the Charter clearly shows, has a commitment to freedom of expression. The coming court battles and judicial decisions will demonstrate just how deeply that commitment goes. In the end, as English based law becomes less of a reality and more of a memory, the Meiklejohn view with its trust in the people might carry the day: "They are, it is true, the governed, but they are also the 'governors'."[99]

APPENDIX

CANADIAN CHARTER OF RIGHTS AND FREEDOMS

Guarantee of Rights and Freedoms

1. The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

Fundamental Freedoms

2. Everyone has the following fundamental freedoms:
   b. freedom of thought,belief, opinion and expression, including freedom of the press and other media of communication.

Enforcement

24. (1) Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

Application of Charter

32. (1) This Charter applies
   (a) to the Parliament and government of Canada in respect of all matters within the authority of Parliament including all matters relating to the Yukon Territory and Northwest Territories; and
   (b) to the legislature and government of each province in respect of all matters within the authority of the legislature of each province.

GENERAL

52. (1) The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.

Reference Notes

[1]Friedenberg, Deference to Authority: The Case of Canada, (New York: M.E. Sharpe Inc.), 1980 at 87. There was a large body of opinion against the entrenchment of a Bill of Rights. The classic arguments used for that position are found in Schmeiser, "The Case Against Entrenchment of A Canadian Bill of Rights," Dalhousie Law Journal, 15, 1973-74, 1.

[2]Friedenberg, an American scholar living in Canada since 1970, is in an excellent position to make comparisons of the Canadian and American political cultures. He describes how Canadians have traded freedom, to a greater extent than in the U.S., for security. For a more condensed reading of this theme, see Kaufman, "Canada: An American Discovers its Difference," Provincial Judges Journal, 8, 1984, 21.

[3]Quebec was the only province not to ratify the Constitution--it represents roughly 25% of Canada's population.

[4]See Section 52 in Appendix.

[5]Emerson, Toward a General Theory of the First Amendment, (New York: Random House), 1966, at 16. Clare Beckton, a Canadian legal scholar, echoes this view: "It is necessary that freedom of expression only be limited in accordance with principles that...can be rationalized in all cases..." Beckton, "Freedom of Expression," in Tarnopolsky and Beaudoin (eds.) The Canadian Charter of Rights and Freedoms: Commentary, (Toronto: Carwell Co.), 1982, at 76.

[6]Chief Justice Dickson, "The Role of the Supreme Court of Canada," Advocate's Society Journal, 3, 1984, at 5.

[7]Bender, "The Canadian Charter of Rights and Freedom and the United States Bill of Rights," McGill Law Journal, 25, 1983, at 815.

[8]The Attorney-General of Nova Scotia, as in Low, "The Canadian Charter of Rights and Freedoms and the Role of the Courts: An Initial Survey," U.B.C. Law Review, 18, 1984, at 69.

[9]Dickson, Supra. N. 7, at 5.

[10]Hawkins and Smith, "A Rights Tradition for Canada: A Framework for Thinking about the Charter," The Advocate's Society Journal, 1982, 1, at 9.

[11]This paper will not deal with slander or with the many forms of criminal libel still on the books. Already, the Law Reform Commission of Canada has published a study recommending the abolishment of the defamatory libel provisions in the Criminal Code. The Law Reform Commission of Canada, Defamatory Libel, Working Paper 35, 1984.

[12]Schauer, Free Speech: A Philosophical Inquiry, (Cambridge: Cambridge University Press), 1982, at 67.

[13]Emerson, Supra. N. 5, at 68.

[14]Shakespeare expresses this very well.

Iago: Good name in man, and woman, dear my lord,
Is the immediate jewel of our souls.
Who steals my purse steals trash. 'Tis something, nothing;
'Twas mine, 'tis his, and has been slave to thousands,
But he that filches from me my good name
Robs me of that which not enriches him,
And makes me poor indeed.

Othello, III iii, 155-61

[15]New York Times Co. vs. Sullivan, 376 U.S. 254 (1964) at 272, citing Judge Egerton in Sweeney vs. Patterson, 128 F. 2d. 457 at 458 (D.C. Cir.)

[16]Meiklejohn, "The First Amendment is an Absolute," 1961 Supreme Court Review at 259.

[17]New York Times Co. vs. Sullivan, Supra. N. 15.

[18]Kalven, "The New York Times Case: A note on 'The Central Meaning of the First Amendment,'" 1964 Supreme Court Review, at 221, note 125. This remark was made to Professor Kalven in a conversation with Meiklejohn.

[19]See, for example, Atkey, "Introductory Remarks," Conference on the Impact of the New Charter of Rights and Freedoms on Publishing, Broadcasting, and Advertising, Canadian Bar Association, 1982, 3.

[20]Doody, "Freedom of the Press, the Canadian Charter of Rights and Freedoms, and a new category of Qualified Privilege for the Press," Canadian Bar Review, 61, 1983, 124.

[21](1978) 90 D.L.R. (3d) 321 at 342-343.

[22]Madott, "Libel Law, Fiction and the Charter," Osgoode Hall Law Journal, 21, 1983, at 745.

[23]Porter, "Pleadings and Tactics from the Plaintiff's point of view," in The Law of Defamation, Law Society of Upper Canada, 1981, at 1.

[24]All civil law comes under the jurisdiction of the provinces following Section 92 of Canada's original constitutional act, The British North America Act (1867) 30-31 Vict., c. 3.

[25]See, for example, Ontario, The Libel and Slander Act, R.S.O., 1980, c. 237.

[26]Atrens, "The Elements of an action for Defamation," Libel and Contempt: The Law and the Media, The Legal Education Society of B.C., 1982, at 1.

[27]Weiler, "Defamation, Enterprise Liability and Freedom of Speech," University of Toronto Law Journal, 17, 1967, at 280.

[28]Richard, "Defences to an Action for Defamation," The Law of Defamation, Law Society for Upper Canada, 1981, A-1.

[29]Atrens, Supra. N. 26, at 2.

[30]Laskin, "What is Defamation?" The Law of Defamation, Law Society for Upper Canada, 1981, B-1.

[31](1936) 2 All E.R. 1237 at 1240.

[32]For the former: Richard, Supra. N. 28, at A-2.
For the latter: Porter, Supra. N. 23, at 7.

[33]Associated Leisure vs. Associated Newspapers (1970) 2 Q.B. 450 at 456.

[34]Edwards vs. Bell (1824) 1 Bing. 403 at 409, as cited in Williams, The Law of Defamation in Canada, (Toronto: Legal Textbook Series), 1976, at 58.

[35]An absolute privilege attaches to the following statements in Canada:
1. those in judicial proceedings
2. those in the course of quasi-judicial proceedings
3. those made in the course of Parliamentary procedures
4. statements made by one officer of state to another in the course of duty
5. communications between solicitor and client
6. communications between spouses.

Richard, Supra. N. 28, at A-6.

[36]Williams, Supra. N. 34 at 64.

[37]Togood vs. Spyring (1834) 1 C.M. & R. 181 at 193, as cited in Richard, Supra. N. 28 at A-6.

[38]Porter, "The Impact of the New Charter of Rights and Freedom on Libel and Slander," Impact of the New Canadian Charter of Rights and Freedoms on Publishing, Broadcasting, and Advertising, Canadian Bar Association, 1982, at 16.

[39]Horrocks vs. Lowe (1975) A.C. 135 (H.L) at 150. This test of malice was unaminiously accepted by the Canadian Supreme Court in Davies and Davies Ltd. vs. Kott, (1980) 98 D.L.R. (3d) 591.

[40]Williams, Supra. N. 34, at 83-84.

[41]London Association for Protection of Trade vs. Greenlands Ltd. (1916) 2 A.C. 5 at 21.

[42]Doody, Supra. N. 20.

[43]See Douglas vs. Tucker (1952) S.C.R. 275.

[44]Littleton vs. Hamilton (1974) 47 D.L.R. (3d) 663 at 664-5.

[45]Gatley on Libel and Slander, (7th Ed., 1974), para. 326.

[46]Cherneskey vs. Armadale, Supra. N. 23, at 325.

[47]Minutes of Proceedings and Evidence of Special Joint Committee of the Senate and House of Commons on the Constitution of Canada, (Jan. 27, 1981) 48: 27.

[48]Speech to the Conference on the Impact of the New Charter of Rights and Freedoms on Business, Feb. 5, 1982, at 10 and 11.

[49]Madott, Supra. N. 22, at 756. Madott continues: "The use of the word 'anyone' supports a reading of Section 24 as essentially a request for enforcement of a personal right."

[50]See Appendix.

[51]Gibson, "The Charter of Rights and the Private Sector," Manitoba Law Journal, 12, 1982, at 216.

[52]Doody, Supra. N. 20, at 137.

[53]Ibid., at 137.

[54]Gibson, Supra. N. 51, at 214.

[55]R. vs. Lerke (1984) 13 C.C.C. (3d) 515, at 518.

[56]New York Times vs. Sullivan, Supra. N. 15, at 264.

[57] Ibid., at 265, 277.

[58] Obviously, then, Canadians cannot argue, as some Americans do about the First Amendment, that Section 2(b) is an absolute. This has annoyed--though not alarmed some Canadian legal scholars. McWhinney complains, for example, that the Charter reads like "a civil servant's text" and is filled with "weasel words and qualifications." McWhinney, "The Canadian Charter of Rights and Freedoms: The Lessons of Comparative Jurisprudence," Canadian Bar Review, 61, 1983, at 62.

[59] Christian, "Limitations of Liberty," U.B.C. Law Review, Charter Edition, 1983, at 130. There is no controversy over the contention that "prescribed by law" also refers to common law.

[60] Porter, Supra. N. 38, at 11.

[61] RE Southam Inc. and The Queen, (1983) 41 O.R. (2d) at 124-25. The court held it unconstitutional to bar the press and public from all juvenile trials, but also said it could foresee circumstances when a ban would be acceptable on a case by case basis.

[62] Ibid., at 125.

[63] Atkey, Supra. N. 19, at 4.

[64] Snyder vs. Montreal Gazette (1978) 87 D.L.R. (2d) at 19.

[65] Ibid., at 19.

[66] Platt vs. Time (1964) 44 D.L.R. (2d) at 17.

[67] Butler and Porter, "Recent Trends in Defamation," Libel and Contempt: The Law and the Media, The Legal Education Society of B.C., 1982, at 8.

[68] Thomas vs. CBC et. al. (1981) 4 W.W.R. 289.

[69] Munro vs. Toronto Sun Publishing Corp. et. al. (1982) 39 O.R. 100.

[70] Vogel vs. CBC et. al. (1982) 3 W.W.R. 97.

[71] P. Moon, "TV Network told to pay $1 Million in Libel Suit," The Globe and Mail, Oct. 20, 1984, p. 1.

[72] Meiklejohn, Supra. N. 16, at 254.

[73]New York Times Co. vs. Sullivan, Supra. N. 15, at 270.

[74]Doody, Supra. N. 20, at 124.

[75]Cherneskey vs. Armadale Publishers Ltd. , Supra. N. 21, at 343, citing from (1913) 83 L.J.P.C. 299 at 300.

[76]Porter, Supra. N. 38, at 19.

[77]RE Alberta Statutes (1938) S.C.R. at 133.

[78]Ibid., at 145, 146.

[79]The legislation empowered a regulatory agency to 1) order publication of any new report in any newspaper, 2) obtain the identity of the sources of any news story, 3) declare anyone untouchable as a news source, 4) declare any writer or reporter unpublishable, 5) fine or shut down any paper or periodical that disobeyed orders on the above. Ibid., at 142-43.

[80]Through all the decisions made by the court only one opinion, held by one Justice, had ever questioned the right of Parliament to stifle freedom of expression. Switzman vs. Elbling and Attorney-General of Quebec (1957) S.C.R. at 320 (Justice Abbot).

[81]Stewart, "Press Function Upheld," Editor and Publisher, Nov. 9, 1974 at 7.

[82]New York Times Co. vs. Sullivan, Supra. N. 15, at 269.

[83]Ibid., at 271-272.

[84]Ibid., at 270.

[85]Ibid., at 280.

[86]Rosenbloom vs. Metromedia Inc. (1971) 403 U.S. 29.

[87]Gertz vs. Robert Welch Inc. (1974) 418 U.S. 323.

[88]Stewart, Supra. N. 81, at 7.

[89]Abrams, "The Press is Different," Hofstra Law Review, 7, 1979, at 563.

[90]Meiklejohn, Supra. N. 16, at 259.

[91] Ibid., at 256.

[92] Ibid., at 256.

[93] Ibid., at 258.

[94] B.N.A. Act, Supra. N. 24, Preamble.

[95] Jerome Barron, In a television interview at the Conference on The Media, the Courts, and the Charter, at Osgoode Hall Law School, March 21, 1985.

[96] Robertson vs. Baldwin (1897) 165 U.S. at 281, as cited in Meiklejohn, Supra. N. 16, at 265.

[97] Ibid., at 265.

[98] Ibid., at 265.

[99] Ibid., at 253-54.